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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAMON M. SEYMOUR, Defendant and Appellant.	B190756 (Los Angeles County Super. Ct. No. LA050597)

APPEAL from judgment of the Superior Court of Los Angeles County. Martin L. Herscovitz, Judge. Affirmed as modified.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Robert S. Henry, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Damon Seymour (defendant) of two counts of resisting arrest (Penal Code, § 148, subd. (a)(1))[1] (Counts 1 and 2) and one count of possession of a controlled substance (Health & Safety Code, § 11350, subd. (a)) (Count 3). Defendant admitted one prior prison term (§ 667.5, subd. (b)). The trial court sentenced defendant to concurrent terms of 162 days in county jail on Counts 1 and 2, with credit for 162 days in custody, including 54 days of conduct credit. The trial court imposed a consecutive three-year term in state prison on Count 3, consisting of the middle term of two years plus one year for the prior-prison-term enhancement.

On appeal, defendant argues that the trial court erred by instructing the jury that it must find reasonable doubt based on the evidence presented at trial, thus precluding the jury from relying on a *lack* of evidence to determine that the prosecution failed to sustain its burden of proof. Defendant also argues that the trial court erred by denying defendant presentence credit on his sentence for Count 3. For the reasons stated below, we affirm.

BACKGROUND

On the afternoon of November 9, 2005, Officer Raphael Lopez of the Los Angeles Police Department's Narcotics Division was working with several other officers near the intersection of Vanowen Street and Sepulveda Boulevard in Van Nuys, an area known for "high narcotic activity." Officer Lopez observed a man (later identified as Mr. Johnson) walking back and forth and looking around, "as if he was looking for somebody or waiting for somebody out on the street." Mr. Johnson entered the carport of an apartment complex on Sepulveda, where he and another, unidentified male approached defendant. Mr. Johnson and defendant spoke. Defendant then went to a red Hyundai automobile parked in the lot and reached into the center console; when he emerged, it looked to

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[1] All statutory references are to the Penal Code unless stated otherwise.

Officer Lopez as if defendant had something in his hand. Defendant returned to Mr. Johnson, and they engaged in a hand-to-hand transaction.

Based on his training and experience, Officer Lopez believed a narcotics transaction had occurred. He notified the other officers in the area to assist in detaining Mr. Johnson and defendant. Officer Lopez and his partner, Officer David Hayden, first arrested Mr. Johnson. While Officer Hayden watched Mr. Johnson, Officer Lopez and Officer Brenda Nix approached defendant, who was still in the parking lot. When Officer Lopez identified himself, defendant reached into his pocket and tried to put something into his mouth. Believing that defendant was attempting to dispose of narcotics by ingesting them, Officers Lopez and Nix grabbed defendant's arms and ordered him to stop.

Defendant, who is larger than Officers Lopez and Nix, began to flail his arms and to kick backward toward the officers to free himself. He kicked Officer Lopez in the thigh. Two other officers then arrived on the scene to assist Officers Lopez and Nix; eventually, after one of the other officers struck defendant in the face with the heel of his hand, the officers succeeded in subduing defendant and taking him into custody. The officers recovered a single, "off-white rock-like substance" stuck to defendant's sweater near his pocket. The substance was later identified as cocaine. The officers also recovered narcotics paraphernalia and a video-rental card with defendant's name from inside the red Hyundai.

Defendant was charged in Counts 1 and 2 with resisting an executive officer in violation of section 69 and, in Count 3, with possession of a controlled substance in violation of Health and Safety Code, section 11350, subdivision (a). The prosecution also alleged that defendant had served one prior prison term. (§ 667.5, subd. (b).) On Counts 1 and 2, the jury acquitted defendant of violating section 69, but convicted him of the lesser offense of resisting arrest in violation of section 148, subdivision (a)(1). The jury convicted defendant on Count 3. Defendant admitted his prior prison term.

The trial court sentenced defendant to 162 days in county jail on each of Counts 1 and 2, with the sentences to run concurrently. The trial court gave defendant credit for

162 days in custody, consisting of 108 days of actual custody plus 54 days of conduct credit. On Count 3, the trial court imposed a consecutive sentence of three years in state prison, consisting of the mid term of two years plus one year for the prior-prison-term enhancement. Defendant timely appealed.

DISCUSSION

A. The Jury Instructions Did Not Deprive Defendant of Due Process

We review de novo the validity of the trial court's jury instructions. (*People v. Burch* (2007) 148 Cal.App.4th 862, 870.) Defendant argues that the trial court's use of CALCRIM Nos. 220 and 222 violated his right to due process because, taken together, the instructions precluded the jury from considering whether a *lack* of evidence raised a reasonable doubt. We disagree.

CALCRIM No. 220, as given by the trial court, provides in relevant part, "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." CALCRIM No. 222, as given, provides in relevant part, "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence."

Defendant argues that CALCRIM No. 220 requires the jury, "[i]n deciding whether the People have proved their case beyond a reasonable doubt, [to] impartially compare and consider *all the evidence that was received throughout the entire trial*" (italics added). CALCRIM No. 222 limits "evidence" to "the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence." Taken together, defendant contends, these instructions permitted the jury to

consider only whether the *evidence received at trial* gave rise to a reasonable doubt, not whether a *lack* of evidence gave rise to a reasonable doubt.[2] Defendant asserts that the jury was thus prevented from considering defendant's argument that the prosecution had failed to prove that he possessed the cocaine because none of the testifying police officers saw the cocaine in defendant's hand, and the cocaine might have become stuck to the outside of defendant's sweater during his struggle with the police, which occurred in a "high narcotic area."

The challenged instructions did not prevent the jury from considering whether the prosecution failed to present sufficient evidence to sustain its burden of proof. Rather, the jury was likely "to understand by this instruction the almost self-evident principle that the determination of defendant's culpability beyond a reasonable doubt . . . must be based on a review of the evidence presented." (*People v. Hawkins* (1995) 10 Cal.4th 920, 963, abrogated on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) The jury was instructed, "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] . . . [¶] Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." The jury was further instructed that the defendant "has an absolute constitutional right not to testify," and "may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt." The trial court also instructed the jury, "the People must prove that: [¶] 1. The defendant possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance's nature or character as a controlled

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[2] Defendant did not object to the challenged instructions in the trial court. We may nevertheless review defendant's claim of prejudicial instructional error. (§ 1259 ["The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].)

substance . . . ." Inherent in the trial court's numerous instructions to the jury that the prosecution bore the burden to prove defendant's guilt beyond a reasonable doubt is the notion that the prosecution's failure to adduce evidence on an element of the charges—that is, a *lack* of evidence—compels acquittal.

Defendant relies on *People v. Simpson* (1954) 43 Cal.2d 553 and *People v. McCullough* (1979) 100 Cal.App.3d 169. Neither case is determinative. In *Simpson*, the defendant argued that the trial court's instruction on reasonable doubt had shifted the burden to the defendant to prove his innocence. In relevant part, the trial court had instructed the jury, "'The term "reasonable doubt," as used in these instructions, means a doubt which has some good reason for its existence *arising out of the evidence* in the case; such doubt as you are able to find a reason for in the evidence.'" (*People v. Simpson, supra,* 43 Cal.2d at p. 565.) The Supreme Court held this language was "not necessary" and "could have been confusing" because "reasonable doubt . . . may well grow out of the lack of evidence in the case as well as the evidence adduced." (*Id.* at p. 566.) The Court nevertheless concluded that, "under the circumstances here prevailing," it did not believe "the jury could have been confused, or the defendant prejudiced" by the instruction. (*Ibid.*)

In *People v. McCullough, supra,* 100 Cal.App.3d at pp. 180-182, the trial court orally answered jurors' questions regarding the definition of reasonable doubt. A juror asked, "So then the doubt must arise from evidence?" The trial court answered, "Well, I would answer that yes, . . . if your question is—what is reasonable doubt—reasonable doubt is that state of the case which, after a comparison and consideration of all the evidence—that is the evidence introduced in the trial . . . consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (*Id.* at p. 181.) The court of appeal held that "the trial court misled the jury by telling it that the 'doubt must arise from the evidence'" because reasonable doubt "'may well grow out of the lack of evidence in the case as well as the evidence adduced.'" (*Id.* at p. 182.) The court concluded, however, that the error was harmless. (*Id.* at p. 183.)

Unlike both *People v. Simpson, supra,* 43 Cal.2d 553 and *People v. McCullough, supra,* 100 Cal.App.3d 169, the trial court in this case did not instruct the jury that reasonable doubt must *arise* from the evidence. Rather, the trial court instructed the jury that, in deciding whether the prosecution met its burden of proof, the jury must "compare and consider all the evidence." Nothing in the trial court's instructions communicated to the jury that it could not consider a lack of evidence in deciding whether the prosecution met its burden to prove defendant guilty beyond a reasonable doubt. Indeed, defendant's trial counsel argued to the jury the very same "lack of evidence" that his appellate counsel claims the jury did not consider.

B. The Trial Court Did Not Improperly Deny Defendant Presentence Credits

The trial court sentenced defendant to concurrent 162-day terms in county jail on Counts 1 and 2, and gave defendant presentence credit for 162 days. The trial court sentenced defendant to a three-year term in state prison on Count 3, to run consecutively to defendant's sentences on Counts 1 and 2. Defendant objected to being denied presentence credit toward his sentence on Count 3. The trial court responded, "I did give him credit. [¶] When you receive a consecutive sentence you only get credit toward the first sentence." Defendant asserts that this was error.

The trial court was correct. Section 2900.5, subdivision (b) provides, "For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. *Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed"* (italics added).[3] Here, the record indicates that defendant was confined for a single period of 108 days, attributable to the offenses for which he was convicted. Because the trial court imposed a

[3] Although defendant quotes section 2900.5, subdivision (b) in his brief, he omits the final, determinative sentence.

consecutive sentence on Count 3, defendant's total sentence was three years and 162 days. (See *In re Reeves* (2005) 35 Cal.4th 765, 785 ["a prisoner with concurrent sentences for two convictions and a consecutive sentence for another 'is undergoing a single, aggregate term of confinement'"].) Defendant received credit for his 108 days of actual custody, plus 54 days of conduct credit. Defendant's presentence credits therefore reduced his post-sentence period of incarceration by 162 days, consistent with section 2900.5, subdivision (b). (*People v. Bruner* (1995) 9 Cal.4th 1178, 1192, fn. 9 ["when consecutive terms are imposed for multiple offenses in a single proceeding, only one of the terms shall receive credit for presentence custody"] [dictum]; *People v. Montgomery* (1984) 162 Cal.App.3d Supp. 9, 11-12; 3 Witkin, Cal. Criminal Law (3rd ed. 2000) Punishment, § 390, p. 522.)

C. Fine and Penalty

Defendant was convicted of violating Health and Safety Code section 11350, subdivision (a), and the trial court properly imposed a laboratory analysis fee of $50, pursuant to Health and Safety Code section 11372.5, subdivision (a). When it imposed the $50 laboratory analysis fee, the trial court was also required to impose a mandatory $50 state penalty pursuant to section 1464, subdivision (a),[4] and a mandatory additional penalty of $35 pursuant to Government Code section 76000, subdivision (a).[5] (*People v.*

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[4] Section 1464, subdivision (a) provides in relevant part, "[T]here shall be levied a state penalty, in an amount equal to ten dollars ($10) for every ten dollars ($10) or fraction thereof, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses . . . ."

[5] Government Code, section 76000, subdivision (a) provides in relevant part, "In each county there shall be levied an additional penalty of seven dollars ($7) for every ten dollars ($10) or fraction thereof which shall be collected together with and in the same manner as the amounts established by Section 1464 of the Penal Code, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses . . . ."

Talibdeen (2002) 27 Cal.4th 1151, 1155.) The trial court erred by not imposing these penalties. The issue is not forfeited by respondent's failure to raise it in the trial court. (*Id.* at p. 1157.)

In his supplemental brief, defendant urges, in effect, that we should disregard the majority decision in *Talibdeen, supra,* 27 Cal.4th 1151 and instead adopt the position advocated by Justice Werdegar in her concurring opinion (which defendant inaccurately labels "the dissent"). (*Id.* at pp. 1157-1160 (conc. opn. of Werdegar, J.).) This we cannot do. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473.) In any event, Justice Werdegar agreed with the majority's conclusion that the penalties are mandatory, and that the courts of appeal may correct a trial court's failure to impose the penalties, even absent an objection by the People. (*Talibdeen, supra,* 27 Cal.4th at p. 1157 (conc. opn. of Werdegar, J.).) She differed with the majority by construing section 1464, subdivision (d) to permit a trial court to waive the penalties in cases in which a defendant was subject to an order of conditional imprisonment under section 1205, subdivision (a)—a difference irrelevant to the result in this case (as it was in *Talibdeen*) because defendant was not imprisoned under section 1205, subdivision (a). (*Id.* at p. 1160 (conc. opn. of Werdegar, J.).)

Defendant further asserts that his right to due process under the Fourteenth Amendment to the United States Constitution "will be violated if he is forced to endure longer incarceration solely because he is unable to pay these fines." Defendant, however, has not been "forced to endure longer incarceration" because of his inability to pay the fines, nor does the record before us establish that defendant will be unable either to pay the $85 in penalties at issue prior to completing his three-year prison term, or obtain a waiver under section 1464, subdivision (d) from the trial court while he is "in prison." (*Talibdeen, supra,* 27 Cal.4th at p. 1157 ["the trial court retains jurisdiction to waive the penalties so long as the defendant faces the specter of imprisonment for failing to pay a fine"].)

DISPOSITION

The judgment is affirmed. The abstract of judgment is ordered modified to include a $50 penalty pursuant to section 1464, subdivision (a); and a $35 penalty pursuant to Government Code section 76000, subdivision (a).

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.